

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
)

Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)
_____)

MB Docket No. 04-227

COMMENTS OF ECHOSTAR SATELLITE LLC

David K. Moskowitz
Senior Vice President
and General Counsel
EchoStar Satellite LLC
9601 So. Meridian Blvd.
Englewood, CO 80112

Pantelis Michalopoulos
Rhonda M. Bolton
Lee C. Milstein
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Karen Watson
Lori Kalani
EchoStar Satellite LLC
1233 20th Street, NW
Suite 701
Washington, DC 20036-2396

July 23, 2004

SUMMARY

Truly effective competition in the multichannel video programming distribution (“MVPD”) market has yet to be achieved. Despite the continued growth of Direct Broadcast Satellite (“DBS”) subscribership, cable has maintained its advantage in the MVPD market through consolidation, clustering, and bundling, as well as its ability to leverage its access to popular programming. Cable’s advantage is reflected by the fact that, as the Commission observes year after year, cable prices are increasing at a rate many times the inflation rate. Cable’s runaway price hikes demonstrate that its competitors are still not disciplining cable prices regardless of whether these competitors are experiencing healthy growth.

In its Notice of Inquiry, the Commission asks whether statutory or regulatory modifications are warranted in light of changes in the video industry and competition over the last decade. Action is indeed in order, although the Commission already has at hand many tools to strike at the source of the competitive imbalance that continues to exist in the MVPD market – the market power of cable companies and large programming conglomerates. The Commission should take action to encourage programming vendors to voluntarily offer programming a la carte; more proactively enforce the program access and retransmission consent rules; and act on a number of proposals that will help alleviate the bandwidth constraints hampering the ability of DBS to compete with cable. Through such actions, the Commission can ameliorate the competitive imbalance in the market and give consumers better choices for video programming.

TABLE OF CONTENTS

	Page
SUMMARY	i
I. COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING	2
A. Programming Services	2
B. Program Packaging	4
1. Practices that Impede MVPDs' Ability to Offer A La Carte Programming.....	5
a. Bundling Local Network Stations With Other Non-broadcast Programming	5
b. Bundling Cable Networks.....	6
c. Market Penetration Requirements.....	6
2. What The Commission Can Do To Facilitate Voluntary A La Carte Program Offerings.....	7
a. Clarify That Bundling Is Prohibited In the Presence of Market Power.....	7
b. Proactive Enforcement of Program Access	8
c. Exhort Programmers To Voluntarily Offer Programming A La Carte.....	9
C. MVPD Access to Programming.....	9
1. Retransmission Consent.....	10
2. Use of the Terrestrial Loophole to Foreclose Non-Cable MVPDs' Access to Popular Regional Programming	11
D. Other Program Access Issues.....	12
E. Public Interest Programming	13
F. Advanced Services.....	15
G. The Impact of FCC Regulations and Other Provisions of Law Specific to Video Competition.....	18
II. SPECIFIC DATA REQUESTED OF DBS SERVICE PROVIDERS	19
A. Local-into-Local Service	19
B. DBS Programming.....	20
C. Status of DBS Providers' Advanced Service Offerings	22
III. CONCLUSION.....	23

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

)	
In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 04-227
Competition in the Market for the)	
Delivery of Video Programming)	
)	

COMMENTS OF ECHOSTAR SATELLITE LLC

EchoStar Satellite LLC (“EchoStar”) hereby submits its Comments in response to the above-captioned Notice of Inquiry released by the Commission on June 17, 2004.¹ The Notice requests comments on the status of competition in the markets for delivery of video programming. EchoStar’s Direct Broadcast Satellite (“DBS”) service provides digital video and music programming to more than ten million subscribers nationwide.

Despite the continued growth of DBS subscribership, truly effective competition in the MVPD market has yet to be achieved. Cable has maintained its advantage in the MVPD market through consolidation, clustering, and bundling, as well as its ability to leverage its access to popular programming. Cable’s advantage is reflected by the fact that, as the Commission observes year after year, cable prices are increasing at a rate many times the inflation rate.² Cable’s runaway price hikes demonstrate that its competitors are still not

¹ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, MB Docket No. 04-227 (rel. June 17, 2004) (“Notice” or “NOI”).

² *See, e.g., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606, 1610-11 (2004) (observing that over the 1993-2003 period, the rate of cable price increases was more than double the rate of increases in the Consumer Price Index).

disciplining cable prices regardless of whether these competitors are experiencing healthy growth. EchoStar urges the Commission to take actions that will strike at the source of the competitive imbalance that continues to exist in the MVPD market – the market power of cable companies and large programming conglomerates – to help alleviate the imbalance and give consumers better choices for video programming.

I. COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING

The Commission's NOI seeks comment on a number of factors that affect competition in the market for the delivery of video programming and also asks for comment regarding the effect of particular statutes and Commission regulations on these matters. The Commission specifically inquires whether statutory or regulatory modifications are warranted "in light of changes in the video industry and competition over the past decade."³ EchoStar addresses below some of the important factors that affect competition from its perspective, and its views concerning legislative and regulatory changes needed to reduce competitive barriers.⁴

A. Programming Services

The NOI asks to what extent existing channel capacity limits carriage of new programming services.⁵ One of the most significant handicaps on the ability of DBS providers to compete on an even footing with cable is limited bandwidth. The spectrum constraints that DBS providers must contend with mean that, among other things, satellite does not offer a truly

³ NOI, ¶ 10.

⁴ The NOI also requests detailed statistical data concerning the DBS industry. *See id.*, ¶¶ 8-12. This data is provided in comments submitted in this proceeding by the Satellite Broadcasting and Communications Association, the national trade organization that represents DBS and other satellite service providers.

⁵ *Id.*, ¶ 17.

competitive service in all areas. For example, satellite does not offer local stations in all areas. Cable systems also have a return link allowing them to offer interactive video as well as a package of video and broadband Internet access that DBS cannot match because its spectrum is still one-way for consumers. And cable is better able to capitalize on its bandwidth advantage to position itself to expand its high definition television (“HDTV”) service in the future. One of EchoStar’s efforts to overcome the DBS bandwidth deficit, its two-dish solution to help facilitate the rapid delivery of local channels in as many local markets as possible, has been the target of criticism in Congress even though the Commission observed that the two-dish plan could comply with the Communications Act if not implemented discriminatorily.⁶ The possibility that EchoStar may be required in the future to carry all local channels in a market on a single dish heightens the importance of immediate Commission action on proposals to ease the bandwidth constraints suffered by DBS.

EchoStar has advocated a number of proposals to address the bandwidth problem. For example, in other proceedings, EchoStar has noted the pending proposal for 4.5° orbital spacing of DBS satellites.⁷ While this measure would still not create a return link, it would nonetheless provide DBS operators with greater flexibility to offer expanded programming services. Although there have been some questions regarding the technical feasibility of reduced orbital spacing in the DBS band, EchoStar has concluded that it is feasible when appropriate safeguards are put into place, and has submitted applications for four satellites at 4.5° intervals

⁶ See *In the Matter of National Association of Broadcasters and Association of Local Television Stations*, Declaratory Ruling and Order, 17 FCC Rcd. 6065, 6066 (2002), at ¶ 2.

⁷ See *International Bureau Seeks Comment on Proposals to Permit Reduced Orbital Spacings Between U.S. Direct Broadcast Satellites*, Public Notice, Report No. SPB-196 (rel. Dec. 16, 2003).

from neighboring satellites.⁸ The Commission has yet to act in this matter, and has before it conflicting proposals to proceed by the adjudication of individual applications for licenses at reduced spacing or by means of a rulemaking. EchoStar urges the Commission to resolve this conflict.

B. Program Packaging

The Commission inquires as to the extent of MVPDs' ability to offer programming to consumers on an "a la carte" or "mini-tiered" basis, and the economic, legal or other factors that affect MVPDs' decisions concerning program packaging.⁹ EchoStar has submitted comments in the separate proceeding initiated by the Commission to focus on this critically important issue, and incorporates those comments by reference here.¹⁰ For the record in the instant proceeding, EchoStar will briefly discuss some of the key challenges regarding a la carte programming.¹¹

The Commission specifically asks how often satellite providers carry programming networks that they would not otherwise carry, or carry such programming on a tier

⁸ See Comments of EchoStar Satellite, L.L.C., *In the Matter of Proposals to Permit Reduced Orbital Spacings Between U.S. Direct Broadcast Satellites*, Report No. SPB-196 (filed Jan. 23, 2004), at 5.

⁹ NOI, ¶ 18.

¹⁰ *Public Notice*, Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems, MB Docket No. 04-207, DA 04-1454 (dated May 25, 2004).

¹¹ See Comments of EchoStar Satellite L.L.C., *In the Matter of A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207 (filed July 15, 2004).

they would not otherwise choose, but for a tie-in requirement with an essential broadcast or non-broadcast station or network.¹² The answer is that such practices are pervasive.

1. Practices that Impede MVPDs' Ability to Offer A La Carte Programming

As the Commission is aware, there has been a groundswell of support for giving consumers more flexibility to purchase the individual programs they want instead of saddling them with large programming packages that may include programming they find undesirable.¹³ EchoStar, for one, wants to offer consumers this flexibility. But a number of factors inhibit MVPDs' ability to provide a la carte and tiered services today. Foremost among them is large media conglomerates' practice of bundling their must-have programming, including in particular the local network broadcast stations and the most popular cable networks, with programming that consumers do not want. These bundling practices take on a variety of forms.

a. Bundling Local Network Stations With Other Non-broadcast Programming

First is the bundling of retransmission consent for local network stations with carriage of unwanted programming. Where an entity owns both local network stations and cable programming channels, a programming distributor may be unable to obtain retransmission consent for the entity's local network stations, which are a must-have to attract and retain subscribers, without also agreeing to accept (and often pay for) the entity's often less popular cable channels. While an entity may sometimes offer retransmission consent for its local

¹² See NOI, ¶ 17.

¹³ See, e.g., Letter from Senator John McCain, Chairman, Senate Commerce Committee, to Chairman Michael Powell, FCC (dated May 19, 2004) (copy available in FCC docket number 04-207).

network channels on an ostensibly stand-alone basis, the retransmission fee in this circumstance may be many, many times the going rate for comparable local network stations. In this situation, accepting the bundle is the only real economically feasible alternative if the distributor is to provide the local network station to its subscribers at a reasonable price.

b. Bundling Cable Networks

Another brand of tying entails bundling by entities that own several cable networks, some of which are quite popular with subscribers. In this case, the programming vendor will not sell its very popular cable network to the distributor unless the distributor agrees to accept (and often pay for) a plethora of the vendors' other channels, which are often ones not popular with viewers.

It should be noted that in both cases, even if a monetary charge is not assessed for the unwanted channels, there is still a cost for carrying them – the expenditure of bandwidth that could be used to carry other programming or services consumers really desire. Thus, in no sense are these unsolicited channels “free.”

c. Market Penetration Requirements

Finally, many programming vendors make market penetration requirements a condition of selling programming to MVPDs. For example, a programming vendor might offer a distributor a popular cable channel on the condition that the channel be placed in one of the distributor's high penetration packages. This condition deprives the distributor of the flexibility to put the channel in a programming package with a lower market penetration or place the channel in its lineup with out regard to market penetration. Such penetration requirements are tantamount to an arbitrary assumption, imposed by the programmer, that many, perhaps millions,

of subscribers that may not want this network do in fact want it. These requirements make a la carte or tiered offerings impossible with respect to the affected networks.

2. What The Commission Can Do To Facilitate Voluntary A La Carte Program Offerings

Faced with widespread bundling, MVPDs currently have little choice but to offer broad packages. While EchoStar does not believe that mandated a la carte requirements are the answer, the Commission already has the authority to promote voluntary a la carte offerings and help give MVPDs more flexibility to craft package deals where they make economic sense and offer consumers the best value.

a. Clarify That Bundling Is Prohibited In the Presence of Market Power

The programming industry's bundling practices may have been encouraged in part by a misinterpretation of a Commission statement in the retransmission consent/good faith rulemaking – the statement that bundling requests are presumptively consistent with competitive marketplace considerations.¹⁴ This statement has been read by some programmers in a way that yields perverse results – as meaning that even conduct proscribed by the antitrust law's

¹⁴ In the retransmission consent rulemaking, the Commission considered the propriety of tying arrangements and explained that while it presumptively views the conditioning of retransmission rights on the carriage of affiliated programming as consistent with “competitive marketplace considerations,” proposals for retransmission rights that would “frustrate the functioning of a competitive market are not ‘competitive marketplace considerations’” permissible under the Communications Act. *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445 (2000), at ¶ 58. In particular, the Commission held that Section 325 of the Act does not permit “[p]roposals involving . . . carriage terms that result from an exercise of market power by a broadcast station . . . the effect of which is to hinder significantly or foreclose MVPD competition.” *Id.* Therefore, at a minimum, the Commission must clarify that tying retransmission consent to carriage of other content is not permissible in the presence of market power.

prohibition on tying is consistent with competitive marketplace considerations in the eyes of the Commission.¹⁵ The Commission should eliminate that presumption. At a minimum, the Commission should clarify that the presumption does not apply in the presence of market power.

b. Proactive Enforcement of Program Access

The Commission should also more proactively enforce its program access rules to limit bundling and market penetration demands that constrain distributors' flexibility to offer a la carte or tiered services. The program access provision of 47 U.S.C. § 548 prohibits, among other things, vertically integrated "satellite cable programming vendors" from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers." 47 U.S.C. § 548(b). Bundling could have the effect of significantly hindering an MVPD's ability to compete, for example where a vertically integrated programming vendor holds popular channels hostage to its demands that the MVPD also carry undesirable channels. As is the case with retransmission consent tie-ins, if the MVPD refuses to acquiesce, its alternative is not to carry the popular channel. Its ability to compete will surely suffer if there is no reasonable substitute for the channel. Such conduct by vertically integrated programmers should be prohibited.

The program access statute also proscribes discrimination among MVPDs in the sale of satellite cable programming. 47 U.S.C. 548 (c). Thus, where bundling or penetration

¹⁵ Precedent in the antitrust area instructs that tying arrangements harm competition because they "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or lower price but because of his power or leverage in another market." *Northern Pacific Railway v. United States*, 356 U.S. 1, 6 (1958).

requirements are demanded by vertically integrated programmers discriminatorily, the Commission should penalize this behavior.

c. Exhort Programmers To Voluntarily Offer Programming A La Carte

Finally, Congress and the Commission should affirmatively express their expectation that programmers will abandon carriage requirements that stand as obstacles to a la carte program offerings, and should consider a broad range of incentives to reward those programmers that demonstrate flexibility in this regard. This is necessary because the practice of bundling programming is entrenched in the industry and other measures more immediate than retransmission consent and program access complaints will be required to encourage programmers to move to a business model where there is a larger role for a la carte programming. Moreover, in the instances in which programmers' behavior cannot be reached through the complaint mechanisms discussed above, other incentives need to be created to motivate a movement toward a la carte models.

C. MVPD Access to Programming

The Commission's approval of the merger of DIRECTV, Inc.'s parent with The News Corporation leaves EchoStar uniquely situated among MVPDs. Among the top five MVPDs, only EchoStar is not affiliated with a programming vendor. EchoStar accordingly remains highly attuned to program access issues.

1. Retransmission Consent

The Commission asks about the availability of localized programming, such as local network and sports programming, to MVPDs.¹⁶ As discussed above, MVPDs' ability to negotiate for retransmission consent of local network stations is often hampered by the onerous bundling requirements imposed by entities that control these stations as well as other non-broadcast programming. These entities are able to make such tying demands because of their market power. The market power of entities that control local broadcast network programming was confirmed in the past year by the Commission and one court, removing all doubt as to the weight these entities bring to the retransmission consent bargaining table. Earlier this year, the Commission concluded with respect to the News Corp.-owned Fox broadcast network:

News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations. Local broadcast station programming is highly valued by consumers, and entry into the broadcast station market is difficult.¹⁷

And in evaluating EchoStar's recent antitrust complaint against Viacom, owner of CBS, the federal district court for the Northern District of California stated from the bench that EchoStar's tying claims (which included its argument that Viacom satisfies the market power prerequisite to a tying violation) had a substantial likelihood of success on the merits.¹⁸

¹⁶ NOI, ¶ 20.

¹⁷ *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004), at ¶ 201.

¹⁸ *EchoStar Satellite L.L.C. v. Viacom, Inc.*, No. C 04-0049-CW (N.D. Cal. Feb. 27, 2004) (order denying continued temporary relief on other grounds). The dispute was eventually settled by the parties.

EchoStar, on the other hand, wields no market power in retransmission consent negotiations. In light of the documented market power of these networks and this imbalance in bargaining power, EchoStar urges the Commission to strictly enforce the retransmission consent rules, and to closely examine in particular disputes involving MVPDs that lack market power.

2. Use of the Terrestrial Loophole to Foreclose Non-Cable MVPDs' Access to Popular Regional Programming

The Commission also asks whether there is specific programming that is not available to non-cable MVPDs.¹⁹ In 2002, the Commission documented the problem of cable-affiliated program vendors using terrestrial delivery to circumvent program access requirements since these requirements only apply to satellite-delivered programming.²⁰ This situation has not changed. The “terrestrial loophole” continues to be used by cable-affiliated programmers to foreclose non-cable MVPDs’ access to popular programming such as regional sports networks, a well-documented example being the refusal of Comcast to make the Philadelphia sports programming it controls available to DBS operators.

The detrimental effect of this conduct on MVPD competition is also well-documented – the market penetration of DBS providers in areas where such programming is withheld from them is well below the national average.²¹ The Commission thus concluded that

¹⁹ NOI, ¶ 19.

²⁰ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, 12149-50 (2002), ¶ 55 (“Program Access Order”) (“The withholding of programming from competitors as a competitive tactic . . . has been evidenced by the acquisition of rights in terrestrial-delivered content not covered by the statutory restriction.”) (citing *DIRECTV, Inc. v. Comcast Corp.*, 15 FCC Rcd. 22801, 22807 (2000)).

²¹ *Program Access Order*, 17 FCC Rcd. at 12139, n.107 (“[I]t is apparent that DBS penetration in Philadelphia is well below the 18 percent national penetration rate.”).

“terrestrial distribution of programming could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market.”²² EchoStar agrees with this conclusion. While the Commission has demonstrated its understanding of the problem, it appears to be less confident in its statutory authority to address this tactic of cable companies.²³ If the Commission declines to eliminate the terrestrial loophole by regulation, it should recommend to Congress that the program access statute be amended to address this impediment to MVPDs’ ability to compete fairly.

D. Other Program Access Issues

As the Commission observed in its 2002 decision to extend the statutory prohibition on certain exclusive video programming contracts, the terrestrial loophole is but one of the many difficulties facing distributors that are not affiliated with any programming networks. Notwithstanding the growth of non-cable MVPDs in the years since the program access statute was enacted, “access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace.”²⁴ Yet, as the Commission found in 2002, “vertically integrated programmers generally retain the incentive and ability to favor their cable affiliates over nonaffiliated . . . MVPDs to such a degree that, in the absence of the prohibition [on exclusive agreements], competition and diversity in the

²² *Id.* at 12158, ¶ 73.

²³ *See id.* (suggesting that the language of the program access statute precludes Commission action to close the terrestrial loophole).

²⁴ *Program Access Order*, 17 FCC Rcd. at 12125, ¶ 4.

distribution of video programming would not be preserved and protected.”²⁵ These findings are as true today as they were two years ago.

The NOI requests comment on the effectiveness of the Commission’s program access rules.²⁶ The Commission’s decision in 2002 to extend the exclusivity ban was a step in the right direction. However, the Commission has not vigilantly enforced the program access requirements. It has not granted a single program access complaint for years – since the early part of 1998. This lack of vigilant enforcement is not because the anticompetitive practices that prompted enactment of the law have abated. Indeed, these problems persist, as the Commission pointed out in 2002. But EchoStar believes that many cable-affiliated programmers have been emboldened by the Commission’s reluctance to reach the merits or decide the facts of program access disputes. As a result, despite the significant growth in EchoStar’s subscriber base, EchoStar believes that there are still enormous discrepancies in the terms and conditions under which vertically integrated programmers make programming available to EchoStar and to cable operators – discrepancies that are not due to any legitimate competitive factors. Such anticompetitive conduct will continue to flourish, ultimately, to the detriment of consumers, unless the Commission begins to show a greater willingness to act.

E. Public Interest Programming

The Commission requests information regarding the programming provided by DBS operators pursuant public interest programming obligations, including a list of channels carried.²⁷ EchoStar currently carries the following public interest channels: Brigham Young

²⁵ *Id.*, ¶ 3.

²⁶ NOI, ¶ 25.

²⁷ *Id.*, ¶ 22.

University (educational); Classic Arts Showcase (arts); Coulors TV (multi-cultural programming); C-SPAN (news and information); Daystar (religious and family programming); Educating Everyone (educational); Eternal Word Television Network (religious and family programming); Family Net (family programming); Florida Education Channel (educational); Free Speech TV (programming addressing social, political and cultural issues); Good Samaritan Network (workplace learning); Hispanic Information & Telecommunications Network (Spanish educational, instructional and cultural programming); Health TV (health education); Worldlink TV (programming addressing cultural, political and humanitarian issues); NASA Channel (coverage of NASA missions and educational programming); Northern Arizona University (educational); PBS YOU (educational); Research Channel (educational); RFD TV (news and information regarding rural issues); TBN (religious programming); University of California (educational); and University of Washington (educational).

The Commission requests information concerning the selection process for choosing programming for the reserved public interest channels.²⁸ EchoStar selects programming for the reserved channels through use of a selection committee. The committee is comprised of five to six to EchoStar employees who review all applications and make recommendations. Recommendations are then compiled and final channel selections are approved by senior management.

The Commission also inquires whether DBS providers are reviewing public interest programming to ensure that it is commercial free and educational or informational in content.²⁹ EchoStar conducts limited review of public interest programming content, taking into

²⁸ *Id.*

²⁹ *Id.*

consideration the practical constraints associated with the fact that hundreds of programs are broadcast on the reserved channels, and programmers' rights to editorial control. If EchoStar is informed that there is a question concerning the qualification of the content provided by a public interest programmer, EchoStar will conduct a review focused on the programming in question to aid an assessment of whether it is qualified public interest programming.³⁰

F. Advanced Services

The Commission seeks information concerning the deployment of advanced services, such as high-speed Internet access, by MVPDs.³¹ Satellite broadband service represents one of the most promising hopes for expansion of broadband service to rural areas, which are in danger of being completely left out of the broadband revolution. Satellite systems are especially well-suited for the provision of broadband service to rural and other underserved areas because satellites can offer nationwide, ubiquitous service at prices that are distance insensitive, unlike cable and DSL. However, the bandwidth constraints discussed above present an obstacle to satellite carriers' deployment of advanced, or "true broadband" services, defined by the Commission as those with transmission speeds greater than 200 kbps in each direction.³²

³⁰ See *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Interest Obligations*, Report and Order, 13 FCC Rcd. 23254, 23300 (1998), ¶ 110 (Commission directing that "[i]n order to avoid undue intrusion into the programming decisions of qualified programmers, . . . we do not believe that it would be appropriate for DBS providers to pre-screen all programming carried on the reserved channels. Rather, if an abuse of the reserved channels by a particular programmer comes to the DBS provider's attention, it can then take action to ensure that only qualified programs are carried on the reserved channels by that programmer in the future.").

³¹ *Id.*, ¶ 26.

³² See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54 (rel. Mar. 17, 2004), ¶ 11. The

True broadband service is extremely spectrum intensive, and a lack of adequate spectrum contributed to making earlier satellite Internet access offerings uncompetitive, as they lacked a return link and were slower than DSL or cable modems.

The successful rollout of true satellite broadband nationwide will likely require spectrum resources far in excess of what is now available to EchoStar. EchoStar is currently engaged in several efforts to address some of the spectrum constraints that have hindered the development of satellite broadband. As previously noted, EchoStar has urged the Commission to act on requests for 4.5 degree orbital spacing of DBS satellites to make additional spectrum available for use to provide video programming. This additional spectrum can be used to provide bundled Internet access as well. EchoStar has also urged the Commission to re-examine the allocation of spectrum blocks that currently lie unused as another potential resource for the provision of advanced satellite services to consumers. Specifically, EchoStar petitioned the Commission for a rulemaking to re-designate the 28.6-29.1 GHz and 18.8-19.3 GHz bands as spectrum that can be used both by geostationary satellite orbit (“GSO”) and non-geostationary satellite orbit systems in the Fixed-Satellite Service on a co-primary basis.³³ Lifting the domestic restriction on co-primary GSO usage of these bands would increase significantly the chance that the spectrum, which will otherwise lie fallow indefinitely, will be used to provide services benefiting the public interest. The block of spectrum above the DBS band, allocated to the Cable Television Relay Service (“CARS”), is another source of spectrum that can be used to deploy

Commission defines as “high-speed” services with speeds exceeding 200 kbps in only one direction. *See id.*

³³ *See* Petition of EchoStar Satellite Corp. for Rulemaking to Designate the Non-Geostationary Fixed-Satellite Service Bands to Allow Geostationary Fixed-Satellite Service Operations on a Co-Primary Basis, RM No. 10767 (filed Aug. 27, 2003), placed on Public Notice in Report No. 2628 (dated Sept. 25, 2003).

advanced services. The CARS band has been underused for years because of the migration of cable operators from CARS to fiber for transmitting programming to cable headends. The Commission has recognized the potential of the CARS band to serve other uses, determining in a 2002 order that the CARS spectrum could be utilized by other multichannel video programming distributors to augment their intermediate distribution links.³⁴ Although this spectrum would be well-suited to a ubiquitously deployed consumer service, the Commission's 2002 order stopped short of allowing use of the CARS band in this manner, as had been proposed by EchoStar. The Commission did, however, indicate that it "intend[ed] to address in a separate proceeding" the question of using CARS spectrum for ubiquitously deployed consumer services.³⁵

The Commission has yet to initiate such a proceeding regarding the CARS band. It also has not acted on EchoStar's request to lift the domestic restriction on co-primary GSO usage. The Commission should act on these proposals in the very near future to help facilitate the availability of adequate spectrum resources for the deployment of true broadband via satellite.

In the meantime, even before additional spectrum is identified and made available, EchoStar continues to strive to provide consumers with alternatives to cable.³⁶ Through partnerships with telecommunications service providers, EchoStar currently offers a bundled service consisting of local and long distance voice service, high-speed Internet access (provided by using its partners' DSL service), and multichannel video programming. In

³⁴ See *In the Matter of Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, Report and Order, 17 FCC Rcd. 9930 (2002).

³⁵ See *id.*, ¶ 44.

³⁶ See NOI, ¶ 26 (seeking details about advanced services being deployed by MVPDs, costs of such services, and advantages of various delivery technologies).

addition, utilizing its current spectrum capacity, EchoStar will likely offer a satellite-based broadband Internet access product targeting selected areas beginning in early 2005. EchoStar anticipates that any additional bandwidth made available in the future for satellite broadband service can be used to steadily increase efficiency of the service, enhancing its competitiveness with cable modems and DSL. Pricing and packaging for this new service have not been set as of this writing.

G. The Impact of FCC Regulations and Other Provisions of Law Specific to Video Competition

The NOI requests comment on the effect of existing regulations and other provisions of law and whether they have facilitated or hindered competition in the local markets between MVPDs.³⁷ While the Satellite Home Viewer Improvement Act (“SHVIA”) helped create a more level playing field for cable and satellite TV providers in the MVPD market, there are still many significant differences in the regulatory treatment of cable and satellite that affect their relative attractiveness to consumers. For example, the lack of regulatory parity between cable and satellite may be alleviated by giving satellite providers the ability to retransmit “significantly viewed” stations within a community. And the compulsory license that allows satellite carriers to transmit distant network programming to “unserved households,” a matter of crucial importance to millions of mostly rural consumers, should be reauthorized and made permanent like the license available to cable operators. The Commission should urge Congress to take steps to ameliorate these disparities and ensure that satellite carriers can compete vigorously with cable in the MVPD market, while taking care not to impose new requirements

³⁷ *Id.*, ¶ 13.

on satellite carriers that further disadvantage them relative to their primary MVPD competitors, the dominant cable industry.

II. SPECIFIC DATA REQUESTED OF DBS SERVICE PROVIDERS

The NOI contains a number of requests for data from DBS providers. EchoStar provides its responses to these requests below.

A. Local-into-Local Service

The NOI requests specific data pertaining to local service offerings pursuant to SHVIA.³⁸ EchoStar is pleased to provide the following data:

1. Number of Local Markets Served Today and In the Near Future

- Number of local markets EchoStar serves today – 141; local markets are located in all 50 states and the District of Columbia
- Expansion into a total of 151 local markets, including Puerto Rico, anticipated by the end of 2004

2. Number and affiliations of local stations carried by EchoStar

136 ABC
136 CBS
138 NBC
135 FOX
180 PBS
68 UPN
78 WB
16 Telemundo
25 Univision
15 Telefutura
4 Azteca
1 Daystar
7 PAX
88 Independents (which include stations airing ethnic, religious, Spanish and shopping programming)

³⁸ *Id.*, ¶ 46.

3. Cost to consumers for local programming packages

- \$ 5.99 where all four of the Big 4 affiliates (ABC, CBS, NBC and Fox) are offered
- \$ 4.99 where only 3 of the Big 4 are offered
- \$ 3.99 where only 2 of the Big 4 are offered

B. DBS Programming

The NOI requests data concerning DBS programming and prices.³⁹ The following data pertain to EchoStar's offerings:

1. Information on the number of channels and the monthly prices of various EchoStar programming packages --

EchoStar currently has five English language and three Spanish language packages, with the following channel counts and prices:

- America's Top 60: Over 60 channels including local channels for \$29.99
- America's Top 60 Plus: Over 60 channels, including regional sports network(s) for \$29.99
- America's Top 120: Over 120 channels including local channels for \$39.99
- America's Top 180: Over 180 channels including local channels for \$49.99
- America's Everything Pack: Includes America's Top 180 plus 30 premium channels for \$77.99
- DISH Latino: Over 30 channels with locals for \$29.99
- DISH Latino DOS: 120 channels plus locals for \$39.99
- DISH Latino MAX: Over 160 channels plus locals for \$49.99

³⁹ *Id.*, ¶ 47.

- In addition, EchoStar also offers a number of International programming packages.

2. Broadcast and non-broadcast programming in HDTV format –

EchoStar currently offers an HD Package that consists of five HD non-broadcast channels for \$9.99/mo. The following channels are included:

TNT HD
ESPN HD
Discovery HD Theater
HDNet
HDNet Movies

In addition, for customers that subscribe to HBO The Works, HBO HD is included for no additional cost. Likewise, customers that subscribe to Showtime Unlimited receive Showtime HD for no additional cost.

Regarding broadcast channels offered in HD, EchoStar currently provides a distant CBS HD network feed to qualified subscribers.

Finally, EchoStar offers one HD pay-per-view event channel that subscribers can access and pay-per-view for HD movies and special events.

3. Sales of local, regional, or national advertising –

Currently, all of the advertising time sold by Echostar is targeted to national advertisers. This is primarily due to technological and bandwidth limitations that affect EchoStar's ability to deliver satellite signals on a local or regional basis.

DBS operators do not have the ability to insert advertising into any broadcast program. This is not a technical limitation, but rather is a statutory limitation imposed by the statutory copyright licenses applicable to satellite retransmission of broadcast programming.

As for non-broadcast networks, EchoStar is provided with certain slots for the purpose of inserting advertising. The total ad-avail time ranges anywhere from two to three minutes per hour depending on the network.

The insertion of local or regional advertising on ad-supported cable networks via existing spot beam technology is not possible at this time. Offering local or regional advertising opportunities would require a substantial increase in the amount of bandwidth currently available and a significant investment in the infrastructure of EchoStar's uplink facilities.

4. Political candidate requests for advertising time –

No political candidates have requested advertising time from EchoStar to date. The fact that no state or local candidates have requested advertising time from EchoStar is not unexpected, as EchoStar's percentage penetration in each DMA is rarely significant enough to warrant consideration from local or state candidates.

5. DBS-originated programming --

EchoStar currently does not produce programming itself aside from the "Charlie Chat" talk show hosted by its Chief Executive Officer, Charles Ergen, and various barker channels that display information of particular interest to EchoStar subscribers.

C. Status of DBS Providers' Advanced Service Offerings

The Commission seeks information regarding the status of current and future plans for one-way satellite-delivered Internet access with a telephone return path, and two-way satellite-delivered Internet access.⁴⁰ EchoStar's future plans are focused upon the latter type of service because satellite services with a telephone return path have proven to be problematic for several reasons. These reasons include the requirement that customers obtain a second phone line for the service to operate on an "always-on" basis, and the fact that telephone return paths are relatively slow, which further exacerbates the performance disadvantage satellite based-systems already have compared to DSL and cable modems.

The NOI also seeks information on the extent to which DBS providers are offering packages in conjunction with other companies.⁴¹ As noted above, EchoStar offers a bundled package of services in cooperation with its telecommunication service provider-partners.

⁴⁰ *Id.*

⁴¹ *Id.*

EchoStar will continue to partner with other companies when it makes sense to do so as a business matter.

III. CONCLUSION

EchoStar urges the Commission to take the foregoing comments into account in its next annual report on the status of competition among MVPDs.

Respectfully submitted,

David K. Moskowitz
Senior Vice President
and General Counsel
EchoStar Satellite LLC
9601 S. Meridian Blvd.
Englewood, CO 80112

/s/ Rhonda M. Bolton
Pantelis Michalopoulos
Rhonda M. Bolton
Lee C. Milstein
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Karen Watson
Lori Kalani
EchoStar Satellite LLC
1233 20th Street, NW
Suite 701
Washington, DC 20036-2396

July 23, 2004